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No. 77-459

In the Supreme Court of the United States

OCTOBER TERM, 1977

J. NORTON HAAS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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STATEMENT

On April 5, 1976, petitioner pleaded guilty in the United States District Court for the Southern District of Mississippi to having conspired to misapply funds not in excess of $100 belonging to a federally insured savings and loan institution, in violation of 18 U.S.C. 371 and 656. On May 21, 1976, petitioner was sentenced to one year's imprisonment and was fined $1,000. The district court stated that petitioner should serve his sentence at the Forrest County Jail, a federally approved detention facility located in Hattiesburg, Mississippi. The written judgment and commitment order, entered on the same date, recited the same sentence except that it recommended that petitioner serve his sentence at the Madison County Jail in Mississippi, also a federally approved facility.

At the time of petitioner's guilty plea, 18 U.S.C. (1970 ed.) 4202 provided that, in general, a federal prisoner became eligible for parole after having served one-third of his term of imprisonment. On May 14, 1976, however, a week before petitioner was sentenced, the Parole Commission and Reorganization Act (Pub. L. 94-233, 90 Stat. 219 *et seq.*, 18 U.S.C. 4201 *et seq.*) became effective. Section 4205 of the Act (18 U.S.C. 4205), which replaced former 18 U.S.C. 4202, provides that "[a]ny prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, *unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms* * * *" (emphasis added).

On September 3, 1976, petitioner filed a motion to defer, correct, or reconsider sentence in the district court. He contended that because he had been sentenced under the new parole statute for conduct that had occurred before the statute took effect, the district court's failure to provide for his mandatory release on parole after service of one-third of his prison sentence had, in effect, stripped him of the parole eligibility that he would have enjoyed under the former statute and constituted an *ex post facto* application of the revised parole provisions to him. At a hearing on October 29, 1976, the district court declined to declare petitioner eligible for parole upon expiration of one-third of his sentence; it did correct the discrepancy between the oral and written sentence by ordering that petitioner serve his sentence at the Forrest County Jail.

On that same date, petitioner filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. The notice stated that petitioner was appealing from the original judgment, which had been entered on May 21, 1976. Since the notice of appeal was therefore untimely on its face (Rule 4(b), Fed. R. App. P.), the court of appeals *sua sponte* dismissed the appeal as untimely filed (Pet. App. 2a-3a). Petitioner thereafter filed a petition for rehearing in the court of appeals, which was denied on August 16, 1977 (Pet. App. 1a). The petition for a writ of certiorari was not filed until September 22, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1]

DISCUSSION

Petitioner's notice of appeal was filed on October 29, more than ten days after the entry of the May 21 judgment that he designated as the one from which he was appealing. Accordingly, the notice was, on its face, out of time under Rule 4(b), Fed. R. App. P. The time limits of Rule 4(b) are jurisdictional.[2] Nevertheless, we do not believe that Rule 4(b) required the dismissal of this appeal, because, as a matter of substance, petitioner was seeking review of the October 29, 1976 order, and the notice was timely filed from that order. The October 29 order, which denied petitioner's motion to correct what he maintains was an illegal sentence (Fed. R. Crim. P. 35),

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[1]On October 5, 1977, Mr. Justice Powell granted petitioner's application for stay of the mandate of the court of appeals pending the filing of his petition for certiorari.

[2]See *United States* v. *Robinson*, 361 U.S. 220, 229; *United States* v. *June*, 503 F. 2d 442, 443 (C.A. 8); cf. *Durham* v. *United States*, 400 F. 2d 879, 880 (C.A. 10), certiorari denied, 394 U.S. 932; *United States* v. *Smith*, 331 U.S. 469, 472-477.

was an appealable order, and it was the legality of the sentence and not the validity of the judgment of conviction that petitioner sought to have reviewed on appeal.

The principal purposes of the notice requirement and time limitations in Rule 4(b) are to inform other parties of an appellants' intention to appeal and to prevent dilatory tactics that might prejudice the appellee or otherwise hinder effective appellate review. Neither of these considerations requires the dismissal of the appeal in this case. The fact the government was in no way misled by the misdesignation is evidenced by its filing in the court of appeals of a brief on the merits (with no reference to the jurisdictional issue) that concludes (p. 7), "the trial Court's order of October 29, 1976 * * * should be affirmed * * *." Petitioner's counsel made good faith efforts to perfect an appeal, but he inadvertently misdesignated the order from which the appeal was taken. Petitioner was not dilatory; the notice of appeal was filed the same day that the district court denied his motion.

In this circumstance, the court of appeals should have treated the notice filed by petitioner as "an effective, although inept, attempt to appeal from the [October 29 order]." See *Foman* v. *Davis*, 371 U.S. 178, 181; 9 Moore, *Federal Practice*, par. 203.18 (1975 ed.) and cases there cited.

CONCLUSION

If the Court deems it appropriate to entertain the petition for a writ of certiorari even though it was filed out of time, the petition for a writ of certiorari should be granted, the judgment of the court of appeals dismissing the appeal should be reversed, and the case should be remanded to that court to consider the appeal on the merits.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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